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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL J. CRUMMER,

Defendant and Appellant.

A145242

(Contra Costa County  
Super. Ct. No. 05-150363-0)

On May 18, 2015, defendant Michael J. Crummer filed a notice purporting to appeal from “the judgment and decision of the court entered 5-1-2015 by the Honorable Laurel Brady, Judge of the Superior Court . . . .” In fact, on that date Judge Brady filed two orders. The first order denied defendant’s petition for a writ of habeas corpus. The second denied defendant’s petition for a writ of error *coram nobis*. Defendant’s appointed counsel has filed a brief in which he advises that he finds no arguable issues to present, and, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, requests this court conduct an independent review of the record to determine if there are any arguable issues that require briefing. Appointed counsel advised defendant he was entitled to file a supplemental brief, and defendant elected to do so.

Both of defendant’s petitions had the same subject—getting defendant’s two 1996 auto burglary felonies reduced to misdemeanors using the procedure specified in Penal Code section 1170.18, a part of the initiative measure known as Proposition 47 that was approved by the voters on November 4, 2014. At all relevant times, defendant has been serving a term of 37 years to life for his 2005 convictions for robbery and assault with a

deadly weapon, both of which involved the personal use of a deadly weapon and the personal infliction of great bodily injury. Part of defendant's aggregate sentence was a one-year enhancement pursuant to Penal Code section 667, subdivision (b) for one of the 1996 burglary convictions. The 37 years to life term was for the robbery; a separate sentence of 28 years to life for the assault was stayed pursuant to Penal Code section 654. In 2007, this court affirmed defendant's convictions and modified his sentence, striking a one-year enhancement.

On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, thereby establishing a means whereby, under three specified eligibility criteria and subject to certain disqualifying exceptions or exclusions, a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious or violent felony conviction. The procedure specified for seeking relief was "a petition for recall of sentence." (Pen. Code, § 1170.126, subd. (b).) Defendant filed such a petition, which was denied on the ground that defendant was ineligible for relief because both of his 2005 convictions qualified as disqualifying violent felonies. This court affirmed that denial in November 2014.

On March 5, 2015, defendant filed in the trial court a "Request Reduction of Felony Charges to Misdemeanors & Resentencing Per Proposition 47 of November 4, 2014," which was submitted on Judicial Council "Petition for Writ of Habeas Corpus" form MC-275. Among the exhibits attached to the "Request" was defendant's handwritten "Petition for Writ of Error Coram Nobis" by which defendant asked to have the 1996 convictions vacated on the ground that, when he entered pleas of guilty, he was "completely innocent of the charges." The petition is dated "5-22-14."

Although she summarily denied the request and the petition, Judge Brady took the trouble to explain her decisions in separate orders.

With respect to the "Request" for resentencing—which was treated as a petition for writ of habeas corpus—Judge Brady ruled: "Petitioner may be eligible for

resentencing under Proposition 47 unless petitioner has a prior conviction under Penal Code section 667(e)(2)(C)(iv). PC 667(e)(2)(C)(iv) prohibits resentencing if petitioner has a prior conviction as defined under PC 667(d). PC 667(d) defines prior conviction as a conviction under PC 667.5(c) or PC 1192.7(c). [¶] Here, second degree robbery is defined as a violent felony under Penal Code section 667.5(c)(9). Further, any felony conviction which includes personally inflicting great bodily injury, Penal Code section 12022.7, is also a violent felony. (See Penal Codes [*sic*] section 667.5(c)(8).)”

With respect to the petition for writ of error *coram nobis*, Judge Brady ruled: “A petition for writ of coram nobis must reflect that that the petitioner was diligent in presenting the petition. ‘The most common reason for denial of the writ of coram nobis . . . is delay in filing the petition.’ (CEB, 1 Appeals and Writs in Criminal Cases, 2d ed., section 2.206.) Thus, a petition must be brought within a reasonable time after the judgment has been rendered. (*Id.*) An unexplained delay of eight months was too long in *People v. Krout* (1949) 90 CA2d 205. On the other hand, in *People v. Shipman* (1965) 65 C2d 226, 230, the leading case on coram nobis, a delay of ten months was said not to show a lack of diligence. [¶] Here, petitioner has made no attempt to justify the delay in filing this petition following his plea of guilty in August, 1996, nearly 19 years ago. Petitioner’s further claim that the amendment to the Three Strikes Law in November, 2012 (Proposition 36) should commence the time for filing the instant petition is without merit as there is still no explanation for the delay from November, 2012 to the present time, or over two and a half years. Petitioner in either case has not shown due diligence. The delay in filing the petition is fatal.” (Italics added.)

If treated as a petition for writ of habeas corpus, the order of denial is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) However, if treated as a denial of a statutorily authorized request for sentence reduction, which is how we shall treat it, the order denying his “Request” under Proposition 47 is appealable. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 601.) The order denying the *coram nobis* petition is appealable. (*People v. Allenthorp* (1966) 64 Cal.2d 679, 683.)

Judge Brady’s statutory analysis of why defendant is ineligible for Proposition 47 relief is flawless and unanswerable. Defendant’s attempt to rebut in his supplemental brief is not persuasive.

Judge Brady’s determination that defendant was not diligent in seeking *coram nobis* relief can be reversed only for abuse of discretion. (*People v. Kim* (2009) 45 Cal.4th 1078, 1095–1096.) Ordinarily, this requires a showing that Judge Brady’s denial exceeded the bounds of reason. (E.g., *People v. Benavides* (2005) 35 Cal.4th 69, 88.) That standard could not be satisfied here, and, wisely, neither appointed counsel nor defendant make any attempt to do so. Indeed, the absence of diligence is virtually a matter of law. “When a person claims a right to legal redress and admits that he has known of his claimed right for at least 14 years, but does nothing to enforce his rights during that period, . . . it must be held that he has not proceeded with due diligence, and is entitled to no relief.” (*People v. Chapman* (1951) 106 Cal.App.2d 51, 56.) Here, the time defendant was aware of his claimed actual innocence was 19 years. This conclusion would also apply to any effort to obtain relief in habeas corpus. (*People v. Kim, supra*, at pp. 1097–1098.)

Our independent review has disclosed no arguable issues that require further briefing.

The orders are affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Stewart, J.